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FEDERAL COMMUNICATIONS COMMISSION
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William E. Kennard, Esquire
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W., Room 614
Washington, D.C. 20554

Re: Request for Clarification of Post-Auction
Divestiture by Parties Holding Interests that Would
Violate Spectrum Caps under Sections 24.204, 24.822
and 24.833 of the Commission's Rules, 47 C.F.R.
§§24.204, 24.822 and 24.833, PP Docket No. 93-253

Dear Mr. Kennard:

We request clarification of the Commission's rules and policies governing post-auction divestiture of interests in broadband Personal Communications Services ("PCS") applicants to avoid violation of the PCS and PCS/cellular spectrum caps.^{1/}

I. Clarification of Existing Rules.

There are only two Commission Rules that explicitly authorize post-auction divestiture to achieve compliance with the PCS and PCS/cellular aggregation limits.^{2/} The first of these rules, Section 24.204(f), authorizes divestiture of attributable cellular interests to avoid a violation of cellular/PCS spectrum limits, and

^{1/} The Commission has stated that, in order to facilitate a free flow of information between applicants and Commission staff, proceedings involving auction applicants are exempt from the ex parte prohibitions that generally pertain to restricted proceedings. See Public Notice, FCC 94-283, released November 7, 1994.

^{2/} A third divestiture rule, Section 20.6(e), pertains to divestiture of Specialized Mobile Radio ("SMR") interests to comply with the 45 MHz Commercial Mobile Radio Service ("CMRS") spectrum limits.

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the scope of the rule is clear. However, the second rule, Section 24.833, which authorizes divestiture of attributable PCS interests, presents two issues requiring clarification. First, does the rule apply only to situations of attributable interests in multiple PCS applicants, or does it also cover instances where attributable cellular or SMR interests would result in violations of spectrum caps? As discussed below, it is requested that the Commission confirm that the rule applies to PCS, cellular and SMR interests of a party to a PCS application. Second, are the divestiture provisions of Section 24.833 limited to non-controlling interests, or does the rule allow divestiture in cases where some or all of the interests that would lead to spectrum cap violations are controlling? It is requested that the Commission clarify that Section 24.833 allows the divestiture of any non-controlling PCS, cellular or SMR interest, regardless of whether the interest or interests that are retained are controlling or non-controlling. The two rules are discussed in more detail below.

A. Section 24.204(f):

Section 24.204(f) provides divestiture procedures for (i) parties to a broadband PCS application (i.e., having an attributable interest in a PCS applicant) with controlling or attributable ownership interests in cellular licenses where the CGSA(s) covers at least 10 percent (a "significant overlap") but no more than 20 percent of the PCS service area population, (ii) parties with attributable interests in a cellular or PCS licensee/applicant solely due to management agreements or joint marketing agreements, and (iii) parties with non-controlling attributable interests in cellular licenses, regardless of the amount of the significant overlap of the CGSA(s) over the PCS service area population.^{3/} In each case, the broadband PCS applicant shall certify on its short form application that it and all parties to the application will come into compliance with the limitations on common ownership of cellular and broadband PCS and, if a successful bidder, describe on its long form its efforts to date and future plans to come into compliance. Then, if the applicant is otherwise qualified, the application will be granted, subject to a condition that the licensee shall come into compliance with the common ownership limitations within 90 days of "final grant." Therefore, it is clear that the only situation in which Section 24.204(f) would not permit divestiture of a cellular interest is where a person with an attributable interest in a PCS applicant seeks to divest a controlling cellular interest where the significant CGSA/PCS overlap exceeds 20 percent.

^{3/} For purposes of clause (ii), a "non-controlling attributable interest" is one in which the holder has less than a 50 percent voting interest and there is an unaffiliated single holder of a 50 percent or greater voting interest.

B. Section 24.833:

The first ambiguity presented by Section 24.833 is whether it applies only to interests in multiple PCS applicants or to other relevant CMRS interests as well. We advocate the broader reading. Section 24.833 by its terms applies to: "parties sharing a common non-controlling ownership interest who aggregate more PCS spectrum among them than a single entity is entitled to hold (See §§20.6(e), 24.710, 24.204, 24.229(c))" The rule sections cited in Section 24.833 cover every type of spectrum cap: (i) Section 20.6(e) addresses divestiture by holders of SMR spectrum in excess of 5 MHz who apply for 40 MHz of broadband PCS spectrum; (ii) Section 24.710 provides the 98 license limit for one person within the C and F spectrum blocks; (iii) Section 24.204 states the 40 MHz cellular/PCS spectrum cap; and (iv) Section 24.229(c) sets forth the 40 MHz broadband PCS spectrum cap. Therefore, the text of the rule itself indicates that the divestiture procedures described in subsections (a) and (b) of Section 24.833, which are similar to those in Section 24.204(f) described above, apply in situations where the applicant is restricted in the amount of broadband PCS it may obtain not only because of attributable interests in other broadband PCS applicants but also because of attributable interests in cellular or SMR licensees or applicants. However, the order adopting the rule suggests that it addresses situations in which an entity holds non-controlling ownership interests in two or more PCS bidders. Fourth Memorandum Opinion and Order, FCC 94-264, PP Docket No. 93-253 (rel. October 19, 1994) ("Fourth Order") at 24 para. 53. This limited reading is clearly inconsistent with the language of the rule. Therefore, it is requested that the Commission confirm and clarify that Section 24.833 would allow a person with an attributable interest in a PCS applicant to divest interests in that PCS applicant or in other PCS applicants or cellular or SMR applicants or licensees, pursuant to the procedures set forth in subsections (a) and (b) of the rule.

The second point requiring clarification is whether Section 24.833 allows divestiture in cases where some or all of the interests resulting in a spectrum cap problem are controlling interests, or whether the rule only covers situations where every interest is non-controlling. We advocate that the rule apply to all attributable interests, whether controlling or non-controlling, provided only that each interest divested is non-controlling. The rule itself specifies "a common non-controlling ownership interest," and the lack of a provision specifically addressing divestiture of a controlling CMRS interest suggests that the rule is not designed to allow divestiture of controlling interests^{4/}.

^{4/} Sections 24.204(f) and 20.6(e) both include explicit provisions for divestiture of controlling cellular and SMR interests. See Sections 24.204(f)(3)(i) and 20.6(e)(3)(i), which

However, the rule is not expressly limited to situations where none of the multiple interests is a controlling one. As advocated above, an entity with an attributable interest in a PCS applicant should be permitted to divest its interest in any relevant CMRS service - whether PCS, cellular or SMR - in order to come into compliance with spectrum caps. And, as long as the interest divested is not controlling, then Section 24.833 should not be limited to situations where all of the attributable CMRS interests are non-controlling. For example, if an entity with a controlling interest in a cellular carrier (or who is a cellular carrier itself) has a minority interest in a PCS applicant in an area more than 20 percent of the population of which is covered by the cellular CGSA, then the entity should be permitted to divest its non-controlling interest in the PCS applicant. Such an approach will give maximum flexibility to allow persons to divest non-controlling CMRS interests in order that they or others may obtain a PCS license, and thereby promote the Commission's objective that the PCS licenses be acquired by those who value them most highly while maintaining safeguards against abuse of the bidding process and anti-competitive concentration.^{5/}

allow for the 90 day divestiture requirement to be satisfied in the case of a controlling cellular or SMR interest, as the case may be, by the submission by the party to the PCS application of a transfer or assignment application. The lack of such a provision in Section 24.833 suggests that Section 24.833 does not permit the divestiture of controlling PCS, SMR or cellular interests.

^{5/} See Memorandum Opinion and Order, FCC 94-144, GEN Docket No. 90-314, released June 13, 1994 at para. 143; Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd. 2348, 2349 para. 5 (rel. May 4, 1994) ("Second Order"). The Commission's efforts to expand opportunities for divestiture of an attributable but non-controlling interest to permit a PCS applicant to bid on and keep a PCS license are demonstrated by recent modifications to Section 24.204 of the rules. In the Fourth Report and Order, FCC 94-270, GEN Docket No. 93-252 (released November 18, 1994), the Commission deemed certain non-equity relations arising from management and joint marketing arrangements to be attributable interests. At the same time, however, the Commission amended Section 24.204 of the Rules to permit divestiture of these attributable but non-controlling interests to permit a PCS applicant to come into compliance with spectrum caps, regardless of the amount of significant CGSA/PCS service area overlap. There is no difference in theory or practice between permitting a party to a PCS application to divest its attributable cellular interest (resulting from a management or marketing agreement) and permitting a divestiture of any attributable but non-controlling interest arising from equity ownership in any relevant CMRS applicant or licensee. In no case is the risk of abuse of the bidding process

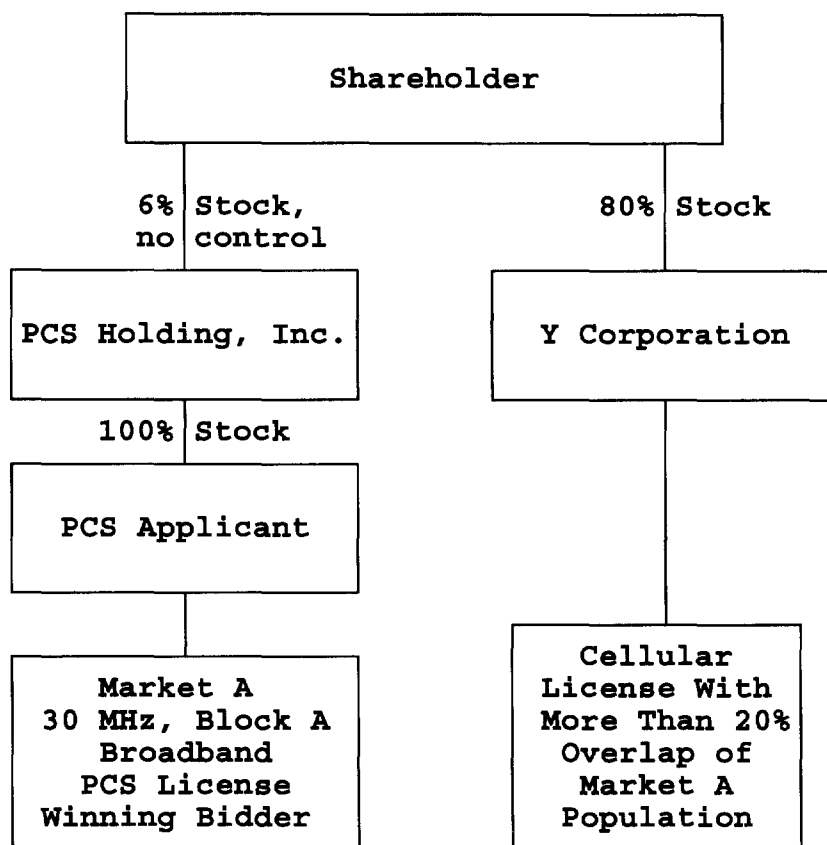
II. Procedures for Divestiture in Cases Not Covered by the Rules,
and Required Level of Disclosure Relating to Divesting Parties.

Even giving the broadest possible reading to Section 24.833, as we request above, certain situations remain that are not addressed by Sections 24.833 or 24.204 but where divestiture should be allowed. Furthermore, clarification is sought regarding the level of disclosure, if any, that is required if a holder of an indirect interest in an applicant agrees prospectively to divest sufficient ownership interests to avoid potential spectrum cap violations because of the complexity - or even impossibility - of analyzing its other interests. The clarifications we seek would all further the Commission's policy of expanding parties' opportunities to bid on PCS spectrum without any countervailing effects on any other Commission PCS policy.

Specific situations that are not the subject of a current divestiture rule and as to which clarification is requested are as follows:

Example 1. PCS Applicant bids on a 30 MHz MTA license, and Shareholder, which holds a 6% non-controlling interest in the 100% corporate parent of PCS Applicant, has a controlling interest in a cellular licensee serving an area with more than 20% population overlap. Graphically, the situation is as follows:

or anti-competitive concentration higher than in any other cases, and the Commission should thus allow the same divestiture opportunities in all cases.



As discussed above, Section 24.204(f) would allow divestiture by its terms only in the event that (i) the cellular CGSA covers 20 percent or less of the PCS service area population, (ii) the party holds an attributable cellular or PCS interest solely due to management agreements or joint marketing agreements, or (iii) the party holds a non-controlling attributable interest in a cellular license and there is an unaffiliated single holder of a 50 percent or greater voting interest, regardless of service area overlap. Even in one of these three cases, by the terms of 24.204(f), Shareholder would be limited to divesting its cellular interest, and the rule does not contemplate divestiture of the interest in PCS Applicant. In the above example, Shareholder's divestiture of a portion of its interest in PCS Holding, Inc. so as to reduce it below the 5 percent threshold would probably be preferable to divesting the cellular interest, in which it has a larger stake.^{6/} Similarly, Section 24.833 may not by its terms apply, because it may be limited to divestiture by a person or entity with two or more non-controlling interests (whether in broadband PCS applicants

^{6/} Section 24.204(f) should be amended to allow a person with attributable interests in a PCS applicant and a cellular carrier to divest its PCS interest, if it so elects.

or any relevant CMRS--see discussion above).

In the case of a PCS/cellular market overlap of greater than 20 percent, the only possible authority for Shareholder's divestiture of its interest in PCS Applicant is found in Section 24.822. Section 24.822 provides, in part, that broadband PCS applicants will be permitted to amend their Form 175 applications:

to make changes to the information required by §24.813(a) (such as ownership changes or changes in the identification of parties to bidding consortia), provided such changes do not result in a change in control of the applicant

This rule would authorize PCS Applicant to amend its Form 175 application to show a reduction in Shareholder's holdings in PCS Applicant (through PCS Holding, Inc.) from an attributable 6 percent to a non-attributable 4.9 percent; however, the rule does not expressly sanction the divestiture by Shareholder, or provide a procedure, such as that set forth in Section 24.204(f)(1)-(3) or 24.833(a) and (b), for a conditional grant of the PCS license to PCS Applicant subject to divestiture of the offending interest within 90 days of the final grant of the PCS license.^{1/} Furthermore, if Shareholder is reluctant to divest sufficient interest in PCS Applicant to avoid attribution, then PCS Applicant itself could be prevented from obtaining its 30 MHz license, or may be required to pay an excessive amount to persuade Shareholder to divest. The opportunities for a recalcitrant minority shareholder to thwart a winning PCS applicant's business plan are manifest.

Accordingly, the Commission should (i) clarify that divestiture by Shareholder of its non-controlling interest in PCS

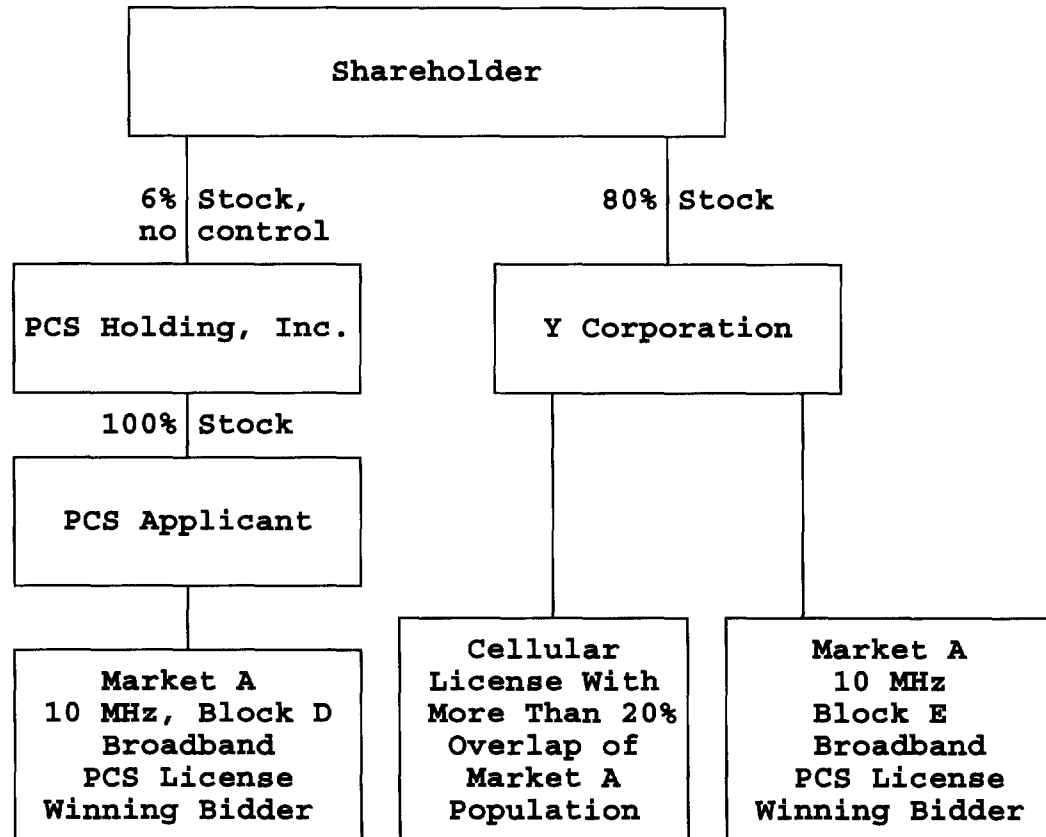
^{1/} Clearly, there is no public policy against such a reduction of a non-controlling interest. Recently, the Commission stated that it would permit ownership changes in which consortium investors drop out of bidding consortia, even if control of the consortium changes as a result. Fourth Order, PP Docket 93-253, at 26 para. 57. The Commission's rationale was that it did not want to restrict some members of the consortia from continuing to bid even though others wished to drop out. By analogy, the Commission should not prevent a minority shareholder from reducing its interest so as to enable the company to bid on and obtain a PCS license. In the case of a market overlap of 20 percent or less, confusion could occur if Section 24.204(f) is read to permit divestiture of the cellular interest only while 24.822 would permit any divestiture in a PCS applicant not resulting in a change in control. This is additional reason for revising Section 24.204(f) to permit divestiture of the PCS interest, not only the cellular interest.

Applicant in the above situation is permitted (and in this case required -- see item (iii) below) (whether pursuant to Section 24.822 or otherwise), (ii) specify a procedure for the conditional grant of a license and a time period for divestiture, along the same lines as set forth in Sections 24.204, 24.833 and 20.6(e), and (iii) implement safeguards to prevent an intransigent minority shareholder in a company from potentially causing the company to lose its PCS license.^{8/} Furthermore, the Commission should clarify that Section 24.204(f) allows the holder of attributable interests in excess of spectrum caps in cases covered by the rules to divest any interests that would bring the holder into compliance with spectrum caps, not just its cellular interests. Thus, if the significant population overlap in the above example were 20% or less, Shareholder would be permitted to effect a slight reduction in its non-controlling, minority interest in PCS Applicant rather than being required to divest a controlling interest in the cellular licensee.

Example 2. In the BTA auctions, PCS Applicant and Shareholder

^{8/} Any ability of Shareholder to prevent PCS Applicant from obtaining a PCS license because of Shareholder's controlling interest in Y Corporation, a cellular licensee with significant market overlap, could interfere with the Commission's goals of awarding licenses expeditiously to a diverse group of service providers. See Second Order, 9 FCC Rcd. at 2349 para 5. The Commission has recognized the dangers of allowing an in-market cellular licensee to bid on a PCS market by limiting post-auction divestiture under Section 24.204(f) to cases of (a) PCS/cellular market overlap of 20 percent or less, (b) attributable interests resulting from management or joint marketing agreements, or (c) non-controlling attributable interests in cellular licensees where there is an unaffiliated controlling party. See Third Memorandum Opinion and Order, FCC 94-265, GEN Docket No. 90-314 (rel. October 19, 1994) ("Third Order") at 15 para. 33. Shareholder's cellular interest could clearly give it an incentive to delay the rapid introduction of PCS in the cellular market, which underscores the importance of preventing Shareholder from interfering with PCS Applicant's obtaining a PCS license on which it is the high bidder. This anti-competitive result could be avoided by requiring the shareholder to divest sufficient minority interests in the winning bidder to avoid attribution and violation of the spectrum caps. Clearly, the winning bidder should be permitted, pursuant to the Commission's rules, to issue additional shares to other shareholders to dilute the interest of the shareholder with the cellular cross-ownership below the attributable level. In appropriate cases the Commission should grant requests for additional time to make any necessary divestitures. See Cincinnati Bell Telephone Company, FCC 94-281 (Com. Car. Bur., rel. November 4, 1994).

(in its case, through a controlled corporation) each bids on a 10 MHz BTA license in the same market, and Shareholder has a controlling interest in a cellular licensee serving an area with more than 20% population overlap. Graphically, the situation is as follows:



As discussed under Example 1 above, Section 24.204(f) would allow divestiture by its terms only in the event that (i) the cellular CGSA covers 20 percent or less of the PCS service area population, (ii) the party holds an attributable cellular or PCS interest solely due to management agreements or joint marketing agreements, or (iii) the party holds a non-controlling attributable interest in cellular licenses and there is an unaffiliated single holder of a 50 percent or greater voting interest, regardless of service area overlap. Furthermore, Section 24.204(f) by its terms provides that Shareholder could divest its cellular interest, but does not contemplate divestiture of the interest in PCS Applicant. Similarly, Section 24.833 may not by its terms apply, because it could be read to be limited to divestiture by a person or entity with two or more non-controlling interests.

In the case of a PCS/cellular market overlap of greater than 20 percent, the only possible authority for divestiture is found in

Section 24.822.^{2/} As discussed under Example 1 above, this rule would authorize PCS Applicant to amend its Form 175 application to show a reduction in Shareholder's holdings in PCS Applicant (through PCS Holding, Inc.) from an attributable 6 percent to a non-attributable interest of less than 5 percent; however, the rule does not expressly sanction the divestiture by Shareholder, or provide a procedure for a conditional grant of the PCS license to PCS Applicant subject to divestiture of the offending interest within 90 days of the final grant of the PCS license. Furthermore, Shareholder's reluctance to divest sufficient interest in PCS Applicant to avoid attribution could prevent PCS Applicant from obtaining its 10 MHz license, or require PCS Applicant to pay an excessive amount to persuade Shareholder to divest.

Accordingly, the Commission should (i) clarify that divestiture by Shareholder of its non-controlling interest in PCS Applicant in the above situation is permitted (and in this case required -- see item (iii) below) (whether pursuant to Section 24.822 or otherwise), (ii) specify a procedure for the conditional grant of a license and a time period for divestiture, and (iii) implement safeguards to prevent an intransigent minority shareholder in a company from potentially causing the company to lose its PCS license. The Commission should also clarify that Section 24.204(f) allows the holder of attributable interests in excess of spectrum caps, in cases covered by the rule, to divest any interests that would bring the holder into compliance with spectrum caps, not just its cellular interests.

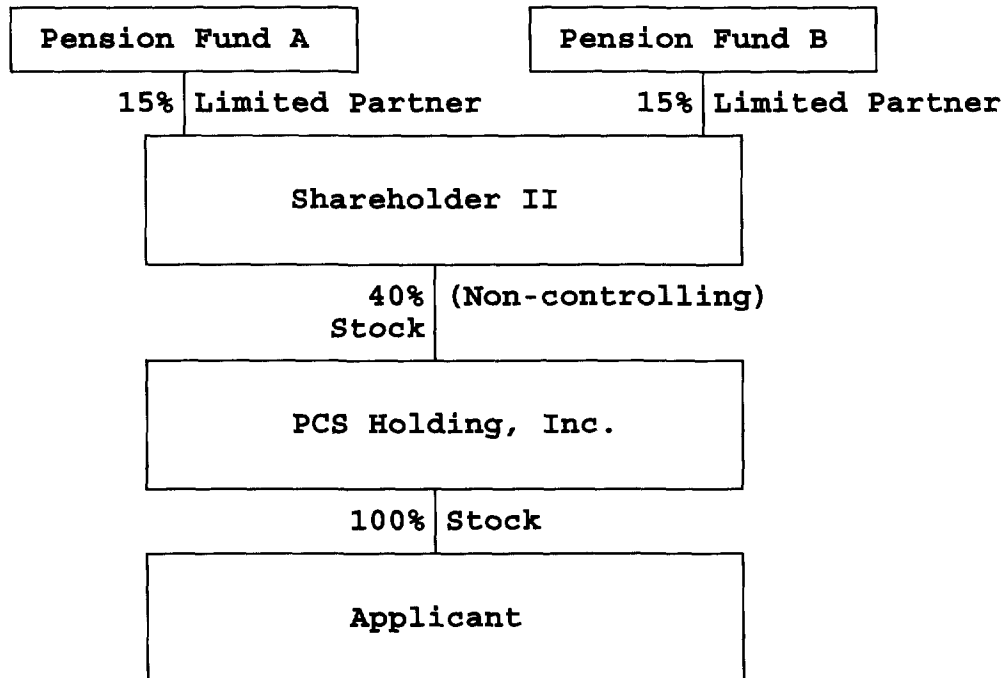
Example 3. Two pension funds have limited partnership interests in Shareholder II, a shareholder in PCS Applicant, and through application of the multiplier, an attributable interest in PCS Applicant. Because it would be very difficult, if not impossible, for them to determine their attributable interests in other CMRS licensees and applicants at any given time, the pension funds have agreed in advance to divest sufficient interests in Shareholder II to eliminate the risk of violating spectrum caps through their indirect, attributable interest in PCS Applicant, in the event PCS Applicant is a successful bidder on any market. Question also

^{2/} In its discussion regarding the 20 percent overlap limitation on the application of Section 24.204, the Commission stated that cellular operators with overlaps in excess of 20 percent may have incentives to delay the rapid introduction of PCS. Third Order, at 15 para. 33. Because the Commission has decided to allow a cellular carrier to obtain a 10 MHz PCS license without any population overlap restriction, permitting divestiture of a portion of its minority interest in another PCS applicant so that the cellular carrier and the other PCS applicant can each obtain a 10 MHz license will promote, not delay, the rapid introduction of PCS by the entities that value the licenses most highly.

William E. Kennard, Esquire
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arises as to what disclosure, if any, is required after the filing of PCS Applicant's Form 175 and prior to divestiture.

The situation is depicted as follows:



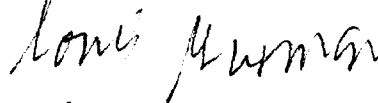
The pension funds' attributable interests, through the application of the multiplier, in PCS Applicant are 6.0 percent. Although they have agreed to divest interests in Shareholder II in the event PCS Applicant is a successful PCS bidder, Sections 24.813(a)(1) and (a)(2) require disclosure of the pension funds' relevant CMRS subsidiaries and affiliates in PCS Applicant's Form 175. Clarification is sought as to two matters. First, because the pension funds have agreed to divest promptly following a successful PCS Applicant bid, their holdings of 5 percent or greater in other businesses should be wholly exempt from the disclosure requirements of Section 22.813.^{10/} Second, the Commission should confirm that PCS Applicant, prior to filing its Form 401, will be allowed to change its ownership structure to reduce the indirect interests of the pension funds, pursuant to Section 24.822 of the Rules.

^{10/} By a separate letter, we have requested that the Commission exempt the interests of the pension funds from the application of the spectrum caps. See letter dated December __, 1994 from Louis Gurman to William E. Kennard, Esquire, General Counsel, a copy of which is attached.

William E. Kennard, Esquire
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We respectfully request that the Commission make the foregoing clarifications to the divestiture rules, ownership disclosure requirements and spectrum aggregation limits. The broadband PCS auction for the MTAs has already commenced and the auctions for the BTAs are expected to be held in the Spring. Because the responses to the issues raised in this letter may affect the disclosure requirements imposed on several broadband PCS applicants and their bidding strategy, we request prompt action. Two copies of this letter are provided. Kindly make this letter part of the public record in the above-referenced docket.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Louis Gurman", written in a cursive style.

Louis Gurman

Enclosure

cc (w/encl.): Rosalind K. Allen, Chief, CRD-WTB
Donald H. Gips, Deputy Chief, OPP
Jonathan V. Cohen, Esquire